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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BLUE CROSS AND BLUE SHIELD
OF VIRGINIA,
Petitioner,

— v. —

MARY BAILEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as interpreted by this Court in *Firestone*, permit a court to give only slight or even "zero" deference to a fiduciary who has discretion to determine benefits but operates under a conflict of interest?

2. Does the common law doctrine of *contra proferentem*, which construes contractual ambiguities against the drafter, apply to a lawsuit challenging a benefits determination by an ERISA fiduciary who has discretion to determine benefits under the governing plan?

PARTIES BELOW

Petitioner Blue Cross and Blue Shield of Virginia appeared in the court below as defendant-appellant. Respondent Mary Bailey appeared as plaintiff-appellee.

RULE 29.6 LISTING

Blue Cross and Blue Shield of Virginia has no parent companies or affiliates. Its nonwholly owned subsidiaries are Primary Care First, L.L.C., Peninsula Health Care, Inc., and Priority, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii

RULE 29.6 LISTING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

Factual Background 3

Procedural History 4

The Fourth Circuit's Opinion 5

REASONS FOR GRANTING THE WRIT 7

I. THE DECISION BELOW TO GIVE "SLIGHT, EVEN ZERO" DEFERENCE TO THE DECISION OF AN ERISA FIDUCIARY WHO HAS DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS IGNORES THIS COURT'S DECISION IN *FIRESTONE* AND EXACERBATES A SPLIT IN THE CIRCUITS 7

The *Firestone* Standard 7

The Fourth Circuit's Standard 8

The Conflict in the Circuits 9

Related Circuit Splits 11

Summary 12

II. THE DECISION BELOW TO APPLY THE COMMON LAW *CONTRA PROFERENTEM* DOCTRINE IGNORES *FIRESTONE* AND CONTINUES AN INTOLERABLE CONFLICT ON A MATTER OF NATIONAL IMPORTANCE 13

CONCLUSION 15

APPENDIX A1

TABLE OF AUTHORITIES

Cases

Atwood v. Newmont Gold Co.,
45 F.3d 1317 (9th Cir. 1995) 9-10

Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989) 11

Bernards v. United of Omaha Life Insurance Co.,
987 F.2d 486 (8th Cir. 1993) 14

Brewer v. Lincoln National Life Insurance Co.,
921 F.2d 150 (8th Cir. 1990),
cert. denied, 501 U.S. 1238 (1991) . . . 13-14, 14 n.2

Brown v. Blue Cross & Blue Shield of Alabama, Inc.,
898 F.2d 1556 (11th Cir. 1990),
cert. denied, 498 U.S. 1040 (1991) 6, 8

Chevron Chemical Co. v. Oil, Chemical & Atomic Workers Local Union 4-447,
47 F.3d 139 (5th Cir. 1995) 10

Davis v. Kentucky Finance Cos. Retirement Plan,
887 F.2d 689 (6th Cir. 1989), *cert. denied*, 495
U.S. 905, *reh'g denied*, 496 U.S. 932 (1990) . . . 11

Doe v. Group Hospitalization & Medical Services,
3 F.3d 80 (4th Cir. 1993) 8

Donatelli v. Home Insurance Co.,
992 F.2d 763 (8th Cir. 1993) 12

Duhon v. Texaco, Inc., 15 F.3d 1302 (5th Cir.), *reh'g denied*, 20 F.3d 471 (5th Cir. 1994) 10

Finley v. Special Agents Mutual Benefit Association, 957 F.2d 617 (8th Cir. 1992) 14

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) . . . . . *passim*

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 10

Kunin v. Benefit Trust Life Insurance Co., 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991) 13, 14 n.2

Luby v. Teamsters Health, Welfare & Pension Trust Fund, 944 F.2d 1176 (3d Cir. 1991) 12

Masella v. Blue Cross & Blue Shield of Connecticut, Inc., 936 F.2d 98 (2d Cir. 1991) . . . 14

McGee v. Equicor-Equitable HCA Corp., 953 F.2d 1192 (10th Cir. 1992) 14

Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993) 12

O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc., 37 F.3d 55 (2d Cir. 1994) 14

Patterson v. Hughes Aircraft Co.,
11 F.3d 948 (9th Cir. 1993) 14-15

Perry v. Simplicity Engineering,
900 F.2d 963 (6th Cir. 1990) 12

Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir. 1990) . . 11

Phillips v. Lincoln National Life Insurance Co.,
978 F.2d 302 (7th Cir. 1992) 15

Pierre v. Connecticut General Life Insurance Co.,
502 U.S. 973 (1991) 11

Quesinberry v. Life Insurance Co. of North America,
987 F.2d 1017 (4th Cir. 1993) 12

Stoetzner v. United States Steel Corp.,
897 F.2d 115 (3d Cir. 1990) 11

Van Boxel v. Journal Co. Employees' Pension Trust,
836 F.2d 1048 (7th Cir. 1987) 9

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 5

28 U.S.C. § 1331 4

29 U.S.C. §§ 1001-1461 . . . . . i, 4

29 U.S.C. § 1132(a)(1)(B) 2, 4

29 U.S.C. § 1144(a) 14 n.2

29 U.S.C. § 1144(b)(2)(A) 14 n.2

Miscellaneous

Annotation, 128 A.L.R. Fed. 1 (1995) 12

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BLUE CROSS AND BLUE SHIELD
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Petitioner,

— v. —

MARY BAILEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Blue Cross and Blue Shield of Virginia asks this Court to issue a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Fourth Circuit on October 11, 1995.

OPINIONS BELOW

The Fourth Circuit's opinion, reported at 67 F.3d 53, appears in the Appendix at A1.

The district court's unreported decision to issue a preliminary injunction against Blue Cross appears at A11. The court's decision to grant summary judgment for Bailey, 866 F. Supp. 277, appears at A24. The court's decision not to vacate its earlier opinions as part of a settlement proposal, reported at 878 F. Supp. 54, appears at A39.

JURISDICTION

Bailey brought this suit under 29 U.S.C. § 1132(a)(1)(B). On November 1, 1994, the district court entered summary judgment in her favor and denied Blue Cross's motion for summary judgment.

Blue Cross appealed, and on October 11, 1995, the Fourth Circuit entered a judgment and an opinion affirming the district court. Blue Cross did not seek rehearing but files this petition within 90 days of the Fourth Circuit's judgment.

This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

STATEMENT OF THE CASE

Factual Background

Mary Bailey is a beneficiary of an ERISA plan established by her husband's company, Bailey Enterprises, and administered by Blue Cross. She sued Blue Cross to make it pay for a controversial procedure that was excluded by her health care plan. Bailey, who has breast cancer, demanded payment for a procedure called high dose chemotherapy with peripheral stem cell rescue ("HDC-PSCR"), and Blue Cross declined to pay because the plan specifically excludes the procedure.

Some of today's avant-garde cancer procedures derive from the following conceptual basis. Applying more chemotherapy kills more cancer. But at higher doses, it also kills the patient. Doctors have therefore devised procedures that include not only high doses of chemotherapy but also some type of rescue from the normally fatal effects of those doses. One such procedure is HDC-PSCR.

It involves four steps. First, the patient receives "growth factors" to increase the number of infection-fighting peripheral stem cells (which become white blood cells) in the bloodstream. Second, doctors harvest some of the patient's peripheral stem cells and freeze them for later use. Third, the patient receives high doses of chemotherapy, which kill not only the cancer but also the body's bone marrow, white blood cells, and peripheral stem cells, rendering the patient defenseless against infection. Fourth, doctors try to rescue the patient's immune system by thawing and reinfusing the harvested peripheral stem cells into the patient's body.

Blue Cross declined to pay for Bailey's HDC-PSCR, based on the following exclusion in her plan:

> Autologous bone marrow transplants or other forms of stem cell rescue (in which the patient is the donor) with high dose chemotherapy or radiation are not covered.

(A2) After listing certain narrow exceptions to this exclusion, the plan reemphasizes the exclusion's general applicability:

> Autologous bone marrow transplants or other forms of stem cell rescue (with high dose chemotherapy and/or radiation), for all other cases are not covered. These include but are not limited to the following: . . . Breast cancer . . . .

(A2)

The plan granted Blue Cross the "sole discretion" to determine "the extent to which a Covered Person is entitled to benefits." (A2-A3) Blue Cross exercised that discretion when it denied Bailey's request.

Bailey conceded below that the plan excludes the PSCR portion of the HDC-PSCR procedure. She argued, however, that the plan covers the HDC portion.

Procedural History

On September 13, 1994, Bailey filed this suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461, in the United States District Court for the Eastern District of Virginia. Jurisdiction derived from 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

Also on September 13, Bailey moved for a preliminary injunction to enjoin Blue Cross from refusing coverage for

the HDC-PSCR procedure. On September 30, the district court granted Bailey's motion for a preliminary injunction.

On October 11, 1994, Bailey moved for summary judgment, and on October 17, Blue Cross also moved for summary judgment.

On November 1, 1994, the district court granted Bailey's summary judgment motion and denied Blue Cross's. The Court found that the exclusion at issue "undoubtedly . . . excludes the peripheral stem cell rescue when accompanied by high dose chemotherapy." (A31) But the court also found that the plan "did not clearly exclude the HDC." In the court's view, this created an ambiguity, which the court construed against Blue Cross. (A37)

On November 2, 1994, Blue Cross filed a timely notice of appeal to the Fourth Circuit, which had jurisdiction under 28 U.S.C. § 1291. In an attempt to settle the case during the appeal, both parties requested the district court to vacate its rulings in the case. The district court denied this motion on March 6, 1995.

The Fourth Circuit's Opinion

On appeal, the Fourth Circuit affirmed the district court's decision granting summary judgment for Bailey.

The court first addressed "the appropriate measure with which to review Blue Cross's denial of benefits under the ERISA plan it administers." (A5) The court found that Blue Cross has discretionary authority under the plan, but the court then found that Blue Cross operated under a "total" conflict of interest.[1] (A6) Therefore, under the reasoning of

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[1] Blue Cross conceded that under Fourth Circuit precedent its denial decision was not entitled to full deference under *Firestone*. Even so, the Record contains no evidence that any conflict affected Blue Cross's

Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556, 1564 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991), the Fourth Circuit found that "'the proper deference to give may be slight, even zero.'" (A6)

Blue Cross noted that the district court had erroneously failed to articulate how much deference Blue Cross should receive. The Fourth Circuit agreed that "a more extensive analysis might have been helpful," but declined to conclude that the district court had erred in not "elaborat[ing] specifically on the degree of deference it considered appropriate." (A6)

Applying this undefined "less deferential standard," the Fourth Circuit agreed with the district court that the plan's exclusion is ambiguous. (A6-A8) Employing the common law doctrine of *contra proferentem*, which courts sometimes invoke to construe a contract's ambiguities against the drafter, the Fourth Circuit found that "the district court's ruling prohibiting Blue Cross from denying coverage for Bailey's high dose chemotherapy was proper as a matter of law." (A8) The Fourth Circuit therefore found no error in the district court's summary judgment for Bailey.

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specific decision to deny Bailey's request for coverage, or that Blue Cross benefited by denying Bailey's request.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW TO GIVE "SLIGHT, EVEN ZERO" DEFERENCE TO THE DECISION OF AN ERISA FIDUCIARY WHO HAS DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS IGNORES THIS COURT'S DECISION IN *FIRESTONE* AND EXACERBATES A SPLIT IN THE CIRCUITS

The *Firestone* Standard

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), this Court announced that principles of trust law determine the appropriate standard of review for actions under § 1132(a)(1)(B). This Court further explained:

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. A trustee may be given power to construe disputed or doubtful terms, and in such circumstances, the trustee's interpretation will not be disturbed if reasonable. Whether "the exercise of a power is permissive or mandatory depends upon the terms of the trust." Hence, over a century ago we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act."

Id. (citations omitted) (alteration in original).

Applying these principles, this Court held in *Firestone* that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard *unless* the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to

> construe the terms of the plan. . . . Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be *weighed as a "facto[r]* in determining whether there is an abuse of discretion."

Id. at 115 (citing Restatement (Second) of Trusts § 187, comment d (1959) (alteration in original) (emphasis added)).

Although a conflict of interest is a factor in abuse-of-discretion review, a court still may only examine whether the fiduciary abused its discretion. As this Court emphasized in *Firestone*:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is *not* subject to control by the court except to prevent an abuse by the trustee of his discretion.

Id. at 111 (quoting Restatement (Second) of Trusts § 187 (1959) (emphasis added)).

The Fourth Circuit's Standard

The Fourth Circuit ignored this precedent in ruling against Blue Cross. Although the court found that Bailey's plan gives discretion to Blue Cross, the court extended its earlier reasoning in *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 87 (4th Cir. 1993), to find that Blue Cross's decision was "'entitled to some deference, but this deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict.'" (A5-A6) The Court then reasoned that because "Blue Cross stood as the single beneficiary of a substantial sum based on its denial of benefits," it operated under a "total" conflict of interest and, under *Brown*, 898 F.2d at 1564, "'the proper deference to give may be slight, even zero.'" (A6)

Thus, despite *Firestone*'s holding that a conflict of interest should be considered as a *factor* within a court's review for abuse of discretion, the Fourth Circuit held that a conflict of interest would trigger an altogether different *standard* of review and could even lead to *zero* deference. Although admitting that it applied a "less deferential standard" due to the conflict of interest, the Fourth Circuit did not describe that standard or explain how the conflict affected it. (A5-A6) Then, after this cryptic analysis, the Fourth Circuit proceeded to accord zero deference to Blue Cross's decision. (A8)

The Conflict in the Circuits

The Fourth Circuit's ill-articulated standard, which denied Blue Cross the benefit of *any* deference, not only ignores *Firestone* but also continues a confusing split in the circuits.

The Seventh Circuit's approach resembles the Fourth Circuit's. *See, e.g., Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (finding that the standard of review for decisions made under a conflict should be "more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is").

The Ninth and Eleventh Circuits dilute *Firestone* even more. Once a claimant demonstrates a conflict of interest, those circuits will apply what is effectively a *de novo* review. As the Ninth Circuit has described the standard:

> If a conflicted fiduciary's interpretation which advances the fiduciary's interest at the expense of the beneficiary is "wrong" under *de novo* review but still "apparently reasonable," the fiduciary has committed an abuse of discretion unless the plan can show that the interpretation was not made to serve its conflicting interest.

Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323 (9th Cir. 1995) (citing *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566-67 (11th Cir. 1990)). The Ninth Circuit acknowledged that other circuits have adopted "very different formulations of the standard." *Id.*

By contrast, the Fifth Circuit's approach faithfully applies the standard set forth in *Firestone*. In *Duhon v. Texaco, Inc.*, 15 F.3d 1302 (5th Cir.), *reh'g denied*, 20 F.3d 471 (5th Cir. 1994), for example, the plaintiff argued that an administrator's conflict of interest warranted a lessened standard of review. Based on this Court's holding in *Firestone*, however, the Fifth Circuit disagreed:

> We fail to find Duhon's argument . . . fully convincing. . . . Although we agree that [there is a] possibility of a conflict of interest, we will follow the Supreme Court's direction in *Bruch* and weigh this possible conflict as a factor in our determination of whether the plan administrator abused his discretion, instead of adopting *ex cathedra* Duhon's suggestion of altering the applicable standard of review. Thus, the standard of review we apply in our review of the plan administrator's decision is the arbitrary and capricious or abuse of discretion standard, with due consideration given to the fact that the plan administrator in this case . . . possibly operated under a conflict of interest.

Id. at 1306. *See also Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447*, 47 F.3d 139, 143-44 (5th Cir. 1995); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1513-14 & 1513 n.13 (5th Cir. 1994).

Thus, the circuits have adopted at least three divergent approaches to reviewing a decision by a fiduciary who has discretion to determine eligibility for benefits but who has been found to have operated under a conflict of interest. The

Fourth and Seventh Circuits would shrink the zone of deference to "even zero." The Ninth and Eleventh Circuits would apply the functional equivalent of *de novo* review unless the administrator or fiduciary could show that its interpretation was not made to serve its conflicting interests. The Fifth Circuit, by contrast, would apply the standard set forth in *Firestone*.

Members of this Court have observed that the circuits disagree on how to apply *Firestone* in reviewing benefits determinations. *Pierre v. Connecticut General Life Ins. Co.*, 502 U.S. 973 (1991) (White, J., dissenting).

Related Circuit Splits

The circuits' disagreement on this issue highlights the general confusion over the appropriate standard of judicial review in ERISA cases. The circuits split on at least three related issues concerning the appropriate deference for reviewing benefits determinations under *Firestone*.

(1) ***The language required to grant discretionary authority and thereby trigger deferential review.*** *Compare Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (discretion granted when the administrator's decisions "shall be final and conclusive") *and Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989) (discretion granted when the administrator has "final, conclusive and binding" authority), *cert. denied*, 495 U.S. 905, *reh'g denied*, 496 U.S. 932 (1990) *with Petrilli v. Drechsel*, 910 F.2d 1441, 1447 (7th Cir. 1990) (no discretion where plan makes administrator's decision "final and binding") *and Baxter v. Lynn*, 886 F.2d 182, 188 (8th Cir. 1989) (no discretion where administrator has "final authority to determine all matters of eligibility for payment of claims").

(2) ***The standard of review governing an administrator's factual determinations.*** *Compare Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552 (5th Cir.) (deference accorded to administrator's factual determinations), *cert. denied*, 502 U.S. 973 (1991) *with Luby v. Teamsters Health, Welfare & Pension Trust Fund*, 944 F.2d 1176 (3d Cir. 1991) (administrator's factual determination subject to *de novo* review).

(3) ***The admissibility of evidence that was not presented to the plan administrator during the claims review procedure.*** *Compare Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990) (district court may not consider additional evidence) *with Donatelli v. Home Ins. Co.*, 992 F.2d 763 (8th Cir. 1993) (district court may consider additional evidence) *and Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1026-27 (4th Cir. 1993) (district court may sometimes consider additional evidence).

Summary

This Court has recently reaffirmed *Firestone* and its underpinnings in the common law of trusts, *see Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068 (1993). Nevertheless, the circuits conflict on nearly every conceivable issue under *Firestone*. *See, e.g.*, Annotation, 128 A.L.R. Fed. 1 (1995) (noting that after *Firestone*, issues regarding judicial review of plan determinations "have become more problematic" and "the scope of the deferential standards that might apply have been much litigated").

That creates an intolerable situation for all parties involved in creating and operating ERISA plans, because the law in this area sorely lacks the uniformity and predictability that is vital to effective plan administration. All parties would benefit from this Court's resolution of the many circuit splits that have arisen.

Seven years have elapsed since *Firestone*. The issues raised by that decision have more than adequately percolated through the courts of appeals. This Court should now resolve the conflicts in the circuits by reviewing the decision below.

II.

THE DECISION BELOW TO APPLY THE COMMON LAW *CONTRA PROFERENTEM* DOCTRINE IGNORES *FIRESTONE* AND CONTINUES AN INTOLERABLE CONFLICT ON A MATTER OF NATIONAL IMPORTANCE

In *Firestone*, this Court explained that "settled principles in trust law" require the courts to "construe terms and trust agreements without deferring to either party's interpretation." 489 U.S. at 112.

By contrast, the Fourth Circuit, after finding the plan's exclusion ambiguous, upheld the district court because "ambiguous language must be construed against the drafter." (A8) The court's reliance on the common law *contra proferentem* doctrine highlights another intolerable conflict among the circuits.

This conflict arose in 1990. The Ninth Circuit held that *contra proferentem* applies to ERISA cases, *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), *reh'g denied*, 498 U.S. 1074 (1991), while the Eighth Circuit held that the doctrine "does not regulate insurance and is preempted by ERISA," *Brewer*

v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150, 153 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991).[2]

Since then, the Second Circuit has adopted a mixed approach. On the one hand, the court has approved *contra proferentem* for *de novo* review of ERISA insurance plans. *Masella v. Blue Cross & Blue Shield of Connecticut, Inc.*, 936 F.2d 98, 106 (2d Cir. 1991). On the other hand, a court is "less inclined" to apply the doctrine where the fiduciary has discretion to interpret the plan. *O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc.*, 37 F.3d 55, 61 (2d Cir. 1994).

The conflict persists. *See, e.g., McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1200 n.11 (10th Cir. 1992) (discussing *contra proferentem*'s applicability and noting that the "circuits are split on this issue"). *Compare Bernards v. United of Omaha Life Ins. Co.*, 987 F.2d 486, 488 n.1 (8th Cir. 1993) (noting that *contra proferentem* "has no place in the construction of an ERISA plan") *and Finley v. Special Agents Mut. Ben. Ass'n*, 957 F.2d 617, 619 (8th Cir. 1992) (same) *with Patterson v. Hughes Aircraft Co.*, 11

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[2] ERISA sweepingly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), while saving a state law if it "regulates insurance," 29 U.S.C. § 1144(b)(2)(A).

The Ninth Circuit did not reach the preemption question because it would irrespectively apply *contra proferentem*. *See Kunin*, 910 F.2d at 540 n.8. For two reasons, however, the Eighth Circuit "expressly disagree[d]" with *Kunin* and reached the opposite result. *Brewer*, 921 F.2d at 154 n.2. First, the court held that ERISA preempts *contra proferentem* because the doctrine "does not regulate the insurance industry." *Id.* at 153. Second, *Firestone* indicates that "neither party's construction should be favored." *Id.* at 153-54 (citing *Firestone*, 489 U.S. at 114).

F.3d 948, 950 (9th Cir. 1993) (applying *contra proferentum*) *and Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 312 (7th Cir. 1992) (applying the doctrine while recognizing the direct split in the circuits).

The Fourth Circuit's reliance on the common law *contra proferentem* doctrine, like the court's altered standard of review, ignores this Court's *Firestone* decision and continues a direct conflict in the circuits.

CONCLUSION

The decision below exacerbates at least two conflicts in the circuits over important issues of ERISA's application. This Court's review is essential to establishing intelligible standards for judicial review of ERISA plan determinations. These standards are now in disarray.

By granting certiorari, this Court could resolve the conflict between *Firestone*, the ruling below, and decisions in other circuits. The Court could thus clarify the law governing judicial review of ERISA plans.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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